IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2893 of 2002

Abbubhakar Irshad Ali & Anr. .. Petitioners

versus

Trafalgar House Construction & Ors. .. Respondents

...

Mr.R.D. Bhat for the petitioner

Mr.J.P. Cama with P.C. Pavaskar for the respondent nos.1 to 4.

CORAM : D.G. KARNIK,J.

DATED : 18th July 2005.

ORAL JUDGEMENT:-

1. By this petition, petitioners challenge the judgement and order dated 22nd July 2002 passed by the Industrial Court, Mumbai dismissing the two complaints of the petitioners bearing complaint no.

47 of 1999 and 1295 of 2000.

2. Respondent no.1 is a public limited company which has merged with the respondent no.2 company. Respondent nos.3 and 4 are a director and a manager respectively of respondent no.2.

3. Petitioner no.1 was a past employee of the respondent no.1/2 and petitioner no.2 is an unrecognised union which is espousing cause of petitioner no.1 and about 135 other workmen whose names are mentioned at Exhibit-A to the petition.

4. The respondent no.2 is engaged in the business of Civil construction. The respondent nos.2 takes contracts for civil engineering works at different places all over India. The respondent no.2 has a workforce of some permanent workmen. The respondent no. 2 also engages on temporary basis workers at different contract sites according to its needs. They are engaged for temporary periods only till the completion of the work at contract site. After the work contract site is over, services of temporary workmen are terminated. It is however the case of the petitioners that the services of all

temporary workmen are not terminated immediately on termination of a site contract but some of the workmen who are needed at different sites are recalled and engaged at the other sites as and when the work is available.

5. Majority of the workmen of the respondent no.2 are affiliated to Engineering Mazdoor Sabha, a representative union of workmen recognised under Chapter III of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short 'the ULP Act'). On 14th January 1999, the petitioner no.1 along with one other filed a complaint bearing ULP no.47 of 1999 alleging that the respondent nos.1 to 4 were indulging in unfair labour practices under item 6 of schedule II and items 5, 6, 9 and 10 of schedule IV of the ULP Act. Feeling that it was necessary to join a trade union as a party complainant, the petitioner no.1 along with petitioner no.2 - an unrecognised trade union - filed another complaint bearing no.1295 of 2000 containing almost identical allegations and alleging unfair labour practices. In the Writ Petition no.1317 of 2001 arising out of an interlocutory order passed in the complaint ULP no.1295 of 2000, the

delay in filing of the second complaint was condoned and the second complaint was ordered to be heard along with the first complaint. Accordingly, both the complaints were heard together. After considering the oral and documentary evidence adduced by the parties, the Industrial Court came to the conclusion that the petitioner had not proved commission of any unfair labour practice by the respondents as alleged. Accordingly, by a common judgement and order dated 22nd July 2002, the Industrial Court dismissed both the complaints. That judgement is impugned in this petition.

6. The respondents have a huge godown at Antop Hill, Wadala, Mumbai and have branch offices at Calcutta, Delhi, Madras, Orissa, Mangalore, Goa, Pune and other places in States of Gujarat, Kashmir, Karnataka and Maharashtra. The respondents are engaged in the business of construction of dams, tanks, buildings, etc. and employ about 1000 permanent workmen. According to the petitioners, the petitioner no.1 and other workmen mentioned in the Annexure A to the complaint had joined the respondent nos.1 and 2 several years ago and each of them has completed more than 240 days of continuous service.

Despite that, the respondents have not confirmed them. Some of the temporary workmen who were junior to the petitioner no.1 and other workmen mentioned in the annexure 'A' have been confirmed. The petitioner no.1 is the senior most employee but due to his involvement in organising the workers, he has not been confirmed. The respondents were likely to start new sites at Kurla, Tilak Nagar and also at Andheri-Versova and Thane and though the respondents required further temporary workmen they have not confirmed the petitioner no.1 and other workmen mentioned in the annexure 'A'. The petitioners alleged that the respondents were practising discrimination by conforming junior workmen in preference over the seniors. The respondents by filing their written statement denied the allegations. The respondents asserted that they were carrying on business as civil contractors and apart from the permanent workmen they from time to time were engaging temporary workmen at various sites. Some of the temporary workmen were directly employed at sites while some were employed through sub-contractors on a piece rate basis. The work at various contract sites was of a temporary nature and the temporary workmen were hired only till the

completion of a project and as soon as the work was completed, the temporary workmen employed at the contract sites were discharged. The recognised union from time to time had taken up the issue of confirmation of temporary workmen and as per the requirement of the company, the respondents confirmed the requisite number of workmen. The respondents specifically denied the allegation that junior workmen were made permanent ignoring the rights of the seniors.

7. In the evidence, Mr.Naik on behalf of the respondents stated that in every settlement with the recognised union, on and average 30 temporary workmen were made permanent. He denied the allegation that the juniors were made permanent in preference over the seniors.

8. After considering the evidence adduced, the Industrial Court has held that the respondents had not shown favouritism to one set of workmen regardless of their merit in the matter of confirmation. It also held that the respondents had not employed the employees as badlis, casuals or temporaries and continued them as such for years with

the object of depriving them of the status of permanent employees and had not committed unfair labour practice under item 6 of schedule IV of the ULP Act. It also held that the respondents had not failed to implement any award, settlement or agreement and had not committed any unfair labour practice under item 9 of schedule IV. It also held that the respondents had not indulged in any act of force or violence and had not committed any unfair labour practice under item 10 of schedule IV of the ULP Act. It also held that the petitioner had not proved that the respondents had proposed or continued a lockout - by not giving any work to the temporary workmen - and had not committed any unfair labour practice under item 6 of schedule II of the ULP Act.

Submissions fo the Parties.

9. Learned counsel for the petitioner submits that evidence has not been properly appreciated and misread by the Industrial Court and that the findings recorded by the Industrial Court on all the issues are perverse and therefore need to be set aside in exercise of a writ jurisdiction. Per contra, learned counsel for the respondents submits that the

Industrial Court has taken into consideration all the evidence adduced by the parties and after careful consideration of the evidence has come to the right conclusions. In any event, submits the learned counsel, the findings recorded by the Industrial Court were possible findings. The findings being possible and not being perverse are not open for challenge in exercise of writ jurisdiction under article 226 of the Constitution of India.

10. Learned counsel for the petitioner took me through the evidence adduced by the parties. He also read over substantial portions of the deposition of the witnesses to contend that the findings recorded by the Industrial Court were not borne out on the evidence and in any event were such that no reasonable Tribunal would have come to those conclusions. After having heard the learned counsel for the petitioner, I am not satisfied that the findings recorded by the Industrial Court are based on no evidence or that the appreciation of evidence is so very much erroneous that no man would reasonably reach the conclusions reached by the Industrial Court.

. **Preliminary Objection.**

11. Before I deal with the evidence, it is necessary to consider the preliminary objection raised by learned counsel for the respondent/ regarding the maintainability of the complaint relating to the allegation of unfair labour practice under item 6 of schedule IV of the ULP Act. Sub-section (1) of section 21 of the ULP Act reads as under :

> (1) No employee in an undertaking to which the provisions of the Central Act for the time being apply, shall be allowed to appear,to act or allowed to be represented in any proceedings relating to unfair labour practices specified in items 2 and 6 of Schedule IV of this Act except through the recognised union.
>
> . Provided that, where there is no recognised union to appear, the employee may himself appear or act in any proceeding relating to any such unfair labour practices.

Sub-section (1) of Section 21 o fthe ULC Act specifically lays down that no employee of an undertaking to which the Central Act i.e. the Industrial Disputes Act applies shall be allowed to appear or to act or allowed to be represented in any

proceeding relating to unfair labour practices specified in items 2 and 6 of Schedule IV of the ULP Act except through the recognised union. It is admitted position that in the present case, the petitioner no.2 is an unrecognised union and the petitioner no.1 is not represented by the recognised union. At no point of time, the recognised union viz. the Engineering Mazdoor Sabha sponsored the cause of the petitioner no.1 or any of the employees mentioned in the annexure 'A' to the complaint. Learned counsel for the respondent submits that the petitioner no.2 which is an unrecognised union had no right to represent the petitioner no.1 or to represent any of the employees of the respondents. In the circumstances, submits the learned counsel, the grievance regarding unfair labour practice specified in item 6 of schedule IV could not have been gone into by the Industrial Court and the complaint so far as it relates to item 6 of schedule IV ought to have been dismissed on that ground alone.

12. A perusal of the preamble to the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 would show that the Act was enacted interalia with a view of providing

recognition of trade unions for facilitating collective bargaining for certain undertakings, to state their rights and obligations and to confer certain powers on unrecognised trade unions. Chapter I & II deal with the application of the Act, definitions and authorities under the Act. Exhaustive provisions are made in Chapter III of the Act for recognition of the trade unions. Chapter IV of the Act, which consists of four sections viz. sec.19 to sec.23, states obligations and rights of recognised trade unions and other trade unions. Section 19 specifies the obligations and section 20 specifies the rights of a recognised trade union. Section 21 confers exclusive right on a recognised trade union to represent any employee in any proceeding relating to unfair labour practices specified in items2 and 6 of schedule IV of the Act. It begins with a negative wording and states that no employee in an undertaking shall be allowed to appear or act or allowed to be represented in any proceeding relating to unfair labour practices specified in items 2 and 6 of schedule IV of the Act except through the recognised trade union. Section 22 specifies the rights of an unrecognised trade union. A perusal of section 21 and 22 of the Act would

clearly show that the right to appear, act or be represented in any complaint under item 2 and 6 of Schedule IV of the Act vests only in the recognised trade union. Neither an employee nor an unrecognised union is allowed to appear, act or represent an employee in a proceeding relating to alleged unfair labour practices under items 2 and 6 of schedule IV of the ULP Act. Item 2 of schedule IV relates to abolition of work of a regular nature done by employees and giving such work to contractors as a measure of breaking a strike. Item 6 of schedule IV relates to employment of badlis, casuals or temporaries and continuing them as such for years with the object of depriving them of the status and privileges of permanent employees. Item 2 and 6 of schedule IV relate to collective grievances of workmen or a section of workmen as opposed to any individual grievance of an individual workman. They relate not to an individual employee but collectively to all the employees or a section of employees. The legislature in its wisdom has provided that in respect of the collective grievances falling under items 2 and 6 of Schedule IV only the representative trade union should be able to appear, act or represent the employees. Section 21 not only

prevents an unrecognised trade union to represent the employees but prevents even the individual employees from appearing or acting in the proceedings. The reasons for this is that in respect of such disputes covered by items 2 and 6 of Schedule IV only the recognised union would be in a position to take an appropriate decision taking into consideration the welfare of all the workmen dispassionately and without looking to the individual grievances of workmen in relation to those matters which concern all or a large number of employees. In the circumstances, it has to be held that in respect of any proceedings relating to the items falling under item 2 and 6 of schedule IV of the ULP Act neither an individual employee would be entitled to appear or act nor an unrecognised union would be able to represent him. The preliminary objection is therefore upheld. Neither the petitioner no.1 nor the petitioner no.2 were entitled to appear or act in the complaint so far as it related to the alleged unfair labour practice falling under item 6 of schedule IV of the ULP Act.

13. The major grievance in the two complaints was that the respondents had continued to employ several

workmen at site as temporaries or badlis without confirming them. That grievance squarely falls under item 6 of schedule IV of the ULP Act and therefore the petitioners were not entitled to act or appear in the complaint relating to it. Recognised Union has not supported the petitioners and has not appered for them. As such, the labour court could not have considered the grievances which fell under item 6 of schedule IV and had to dismiss or reject that part of the complaint at the threshold.

. **Other submissions of the parties.**

14. Learned counsel for the petitioner submits that the respondents suppressed the material documents from the Industrial Court and thereby committed a fraud on it. In support of the submission, the learned counsel relies upon the following decisions:

i) S.P. Changalvaraya Naidu Vs. Jagannath & ors. reported in AIR 1994 SC 853.

ii) Chief Conservator of Forests & Anr. Vs. Jagannath Maruti Kondhare reported in 1996 I CLR 680.

iii) Burroughs Welcome (I) Ltd. Vs. D.H. Ghosle & Ors. reported in 2000 III CLR 264.

15. In S.P. Changalvaraya Naidu Vs. Jagannath (Supra), it was held that if any party withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party. Learned counsel for the petitioner submits that as the petitioner had not produced the records to show that petitioner no.1 and other 135 employees listed in Annexure A to the Writ Petition were employed by the respondents they had played fraud on the court and in any event adverse inference ought to have been drawn against the respondents. I am unable to accept the submission. The respondents never disputed that they had employed the petitioner no.1 and other employees mentioned in Annexure-A to the Writ Petition. It was the case of the respondents that they were employing the petitioner no.1 and other workmen purely as temporaries as and when they required additional workmen at respective sites. It was the petitioners' case that they were employed temporarily and not being made permanent and thereby

respondents were committing an unfair labour practice under item 6 of schedule IV to the Act. Thus the fact of temporary employment of the petitioner no.1 and other then 135 was undisputed and therefore it cannot be said that respondents committed any fraud on the court by not producing the records showing their employment. It is also worthwhile to note that whenever the petitioner no.1 and other workmen were employed by the respondents, the employees were given the identity cards as well as provident fund slips. Thus, the petitioner no.1 as well as other employees were also in possession of the necessary evidence regarding their employment, period of their employment and the place of their employment. They have not produced the records in their possession. There cannot be any abstract principle of drawing of an adverse inference. The adverse inference has to be drawn with reference to a particular fact. The factum of employment the petitioner and other 135 workmen mentioned in annexue ’A’ was not denied and there could therefore be no adverse inference drawn against respondent nos.1 and 2 for non production of the records relating to the employment of petitioner no.1 and other workmen.

16. In Chief Conservator of Forests & Anr. Vs. Jagannath Maruti Kondhare (Supra) the Court was required to consider whether the employer was guilty of employing the workers as badlis, casuals or temporaries and to continue them as such for years with the object of depriving them of the status and privileges of permanent employees amounting to an unfair labour practise under item 6 of schedule IV of the Act. On facts of the case, the court held that the environment pollution control work of Ahmednagar whose needs were on the increase was of a permanent nature. The Court further held that in view of the permanency which was writ large on the facts of that case, continuing to employ the workmen in jobs on casual basis for years amounted to unfair labour practice. The present case is distinguishable on facts. The site contract works taken by the respondents are not permanent in nature. They last for a few months. The contract works are performed by the permanent workmen. If and when additional hands are required at contract sites, they are employed by the respondents as per the requirement. This decision is therefore not of any assisance to the petitioners.

17. The decision of a learned Single Judge of this Court in Burroughs Welcome Vs. D.A. Ghosle (Supra) is based on facts. It does not lay down a principle which can be applied to the facts of the present case.

18. The contention of the petitioners is that on completion of the construction contract work at site, the petitioner no.1 and other 135 workmen should be employed by the respondents at a new contract site. The requirements of the respondents are variable. While certain number of employees are required permanently, some additional employees are required depending upon the number of contract with the respondents at a time and the nature of the contracts. The respondent no.2 employs about 1000 permanent workmen and others as per the requirement. In the last few settlements, the respondent no.2 has been absorbing about 30 workmen as permanent workmen. This is with the consent of the recognised union. It must be assumed that there must be hard bargaining at the time of each settlement and the recognised union must also be taking into consideration what would be the permanent work force required. If all the workmen are made permanent and the respondent no. 2

is required to pay their salaries, it may happen that when there is less work the respondent no.2 may not be able to pay salaries to anyone and the very livelihood of the existing permanent workmen may be in jeopardy. After taking into consideration the overall needs for the permanent staff, capacity of the respondent no.2 to pay the wages to the permanent staff that the representative union must be agreeing for the confirmation of only certain number of workmen and not all. In the circumstances, it cannot be said that those workmen who are not made permanent could through an unrecognised union file a complaint of unfair labour practice under item 6 of schedule IV.

19. No other decision was cited. No other point was argued except that a direction similar to the one given in the full bench decision of the Allahabad High Court in Lal Mohammad Vs. Indian Railway Construction Co.Ltd. should be given.

20. In Lal Mohammed Vs. Indian Railway Construction Co.Ltd. reported in 2004 FLY 124, while dismissing the Writ Petition, the full Bench directed that as and when vacancy was available, the employer

company should consider the petitioners therein for appointment. Learned counsel for the respondent no. 2 submits that it has no objection for considering the question of appointment of the 135 workmen mentioned in the Annexure to the complaint as and when vacancies are available but there cannot be any assurance of a priority in appointment. Different workmen have different skills. Some are engaged in piling work, some in masonary and some in other kinds of specialised works. There are numerous tasks like a piling workman, a mason, a loader etc. who are engaged. Some workmen may be more skilled in some kinds of work only and it would be impossible to employ them on the basis of seniority alone in every case. The statement is correct and while a direction can be given for considering the employment of petitioner no.1 and other 135 workmen mentioned in the Annexure-A as and when work is available there cannot be a direction for appointing them on a priority basis only on the basis of their inter se seniority. Hence, I pass the following order:

21. Writ Petition is dismissed.

22. However as and when work is available

respondents shall consider the petitioner no.1 and other 135 workmen mentioned in Annexure-A of the petition for appointment at other sites. It is clarified that while making the appointments the respondents would not bound by the inter se seniority amongst the said 135 workmen as the workers with different skills and aptitudes may be required for different jobs.

D.G. KARNIK, J